Division of Consumer Affairs

Formal Action #6554

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE,

Plaintiff

v.

NEW BEGINNING CREDIT ASSOCIATION, INC., a Tennessee corporation, CREDIT ALLIANCE, INC., a Tennessee corporation, THE CREDIT CONNECTION, INC., a Tennessee corporation, all doing business as NEW BEGINNING FINANCIAL ALLIANCE, and FRANK ANDRE WILLIAM IAQUINTA, individually,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY INJUNCTION

I. Introduction

Plaintiff, the State of Tennessee, brought this consumer protection action on January 28, 1997, against Defendants, New Beginning Credit Association, Inc., a Tennessee corporation, Credit Alliance, Inc., a Tennessee corporation, The Credit Connection, Inc., a Tennessee corporation, all doing business as New Beginning Financial Alliance, and Frank Andre William Iaquinta alleging violations of the Tennessee Credit Service Businesses Act and the Tennessee Consumer Protection Act.

In essence, the complaint alleges that the Defendants charged consumers over $1,000.00 to get an "unsecured" credit card with a $300.00 limit and otherwise engaged in unfair and deceptive trade practices by:

1. Charging consumers for credit services before those services were completed;

2. Charging consumers for credit services they could have performed for themselves;

3. Using fraudulent and misleading advertisements and telemarketing pitches to induce consumers to attend group sales meetings after Defendants had led consumers to believe that they were coming in for the sole purpose of signing up for a credit card for which they had "pre-qualified";

4. Using fraudulent and misleading tactics to convince consumers to execute membership contracts with the Defendants; and

5. Failing to promptly and completely deliver the goods and services the Defendants promised to consumers.

Since the State filed its action on January 28, 1997, the Division of Consumer Affairs of the Tennessee Department of Commerce and Insurance, has received over 200 complaints and

inquiries from concerned members of the public, many of whom are members or former employees of Defendants. The State has filed in support of its Motion for a Temporary Injunction, several affidavits and the sworn statement of a former employee. Taking the record as a whole, the State respectfully submits that this Court should intervene to provide interim protective relief for consumers and to prevent further violations of the law.

II. Factual Record

Defendants use a three-part promotional scheme to market its credit services memberships to consumers. First, they use misleading advertisements in print media along with misleading direct mail and handbill advertisements. Secondly, they use a deceptive and unfair telemarketing scheme to induce consumers with credit difficulties to attend group sales meetings without making appropriate disclosures. Finally, Defendants use misleading and unfair sales pitches at sales meetings to convince consumers to sign credit service membership agreements requiring them to make payments for Defendants' credit services before those services are fully delivered.

Additionally, Defendants fail to timely and fully deliver the goods and services it promises consumers. Also, Defendants charge consumers for credit services that they can perform themselves. Defendants internal procedures, moreover, are designed to punish telemarketers and sales personnel who talk to each other about their respective pitches. See Sworn Statement of Chad Reynolds, pages 24-25.

A. Advertisements

Many of the Defendants' advertisements fail to identify any of the Defendants. In virtually all of their advertisements, the Defendants claim that they can provide an "unsecured" VISA card for consumers "regardless of past credit history". These advertisements also represent that there are no security deposits or application fees required and that the consumer can call for "a quick (3-minute) pre-approval". See Verified Complaint, Exhibit B.

The Defendants, however, fail to disclose the following pertinent information:

1. The initial VISA credit card has only a $300.00 limit and that consumers will have to pay over $1,000.00 in membership fees to the Defendants to obtain this "unsecured" card. In exchange for the membership fees, Defendants act as guarantor for the credit card through a separate agreement the Defendants have entered with the bank issuing the credit card. See Affidavits of Brian K. Hughes, James L. Werner, and Tonya Diane Feury.

2. Defendants do not ever disclose that they cannot legally collect any membership fees from a member until after they have fully provided all the credit "re-establishment" services.

3. The "pre-approval" process is merely a device for screening consumers for potential New Beginning memberships. "Pre-approval" by the Defendants does not guarantee ultimate approval for the credit card by the issuing bank. Sworn statement of Chad Reynolds, page 32-33.

B. Telemarketing Pitches

The Defendants' telemarketers do not disclose that "pre-approved" consumers will not be meeting with a representative of the issuing bank in a private session to complete the details required for the VISA credit card applications, that these consumers will have to attend a group sales meeting with one of Defendants' representatives that will last at least an hour, that consumers will be charged fees exceeding $1,000.00, that consumers will be required to join Defendants' credit "re-establishment" club and that it is unlawful for the Defendants to charge for credit "re-establishment" services until after all the services have been provided. See Affidavits of Tonya Diane Feury and James L. Werner.

Defendants train its telemarketers to say, in effect, that "they are not aware of any additional fees" or "that issue will be covered when you bring in the material to support your VISA application" when consumers ask if there are any additional fees. Sworn statement of Chad Reynolds, pages 30, 31, 38, and 63.

C. Sales Presentation

As consumers are "pre-approved", they are signed up by telemarketers to attend one of Defendants' sales presentations. At these presentations, Defendants' representatives make a sales pitch seeking to persuade consumers to sign membership agreements with the Defendants. Typically, this is the first time that consumers are advised of the Defendants' identity, as well as the fact that consumers cannot get the advertised "unsecured" VISA card unless they pay (or agree to pay) over $1,000.00. See Affidavits of James L. Werner and Brian K. Hughes.

At these sales presentations, however, the Defendants still do not ever disclose that they cannot legally collect any payments from consumers until after all credit services have been provided or that they cannot charge consumers for services that consumers could perform for themselves. Additionally, the Defendants make false and misleading statements at sales meetings to consumers about the impact that this $300.00 "unsecured" credit card and Defendants' other goods and services will have on consumers' credit records. See Affidavit of James L. Werner.

D. After the Sale

After consumers become New Beginning members, Defendants do not timely provide their

benefits and services. See Affidavits of James L. Werner, Roger Ray Galloway and Brian k. Hughes. Additionally, Defendants frequently use aggressive collective methods to collect membership fees from members for whom they have not fully performed. See sworn statement of Chad Reynolds, page 50.

III. Argument

A. The Court has Statutory Authority To Enjoin Violations of the Tennessee Consumer Protection Act

The State is authorized to seek a temporary restraining order and temporary injunction under the express provisions of Tenn. Code Ann. § 47-18-108(a)(1) of the Tennessee Consumer Protection Act, which provides that:

Whenever the (consumer affairs) division has reason to believe that any person has engaged in, is engaging in, or based upon information received from another law enforcement agency is about to engage in any act or practice declared unlawful by this part and that proceedings would be in the public interest, the attorney general and reporter, at the request of the consumer protection division, may bring an action in the name of the state against such person to restrain by temporary restraining order or temporary injunction or permanent injunction the use of such act or practice.

(Emphasis added).

Further, the Court is specifically authorized to issue a temporary restraining order and temporary injunction under Tenn. Code Ann. § 47-18-108(a)(4). That subsection provides as follows:

The courts are authorized to restrain and prevent violations of this part, and such orders and injunctions shall be issued without bond.

The legislative authorization in Tenn. Code Ann. §§ 47-18-108(a)(1) and (4) supplements this Court's authority to issue a temporary restraining order and temporary injunction under Tenn. R. Civ. P. 65. The issuance of injunctive relief, under either grant of authority, is within the discretion of the trial judge. Mason County Medical Ass'n v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977)(trial judge has discretion in the granting or denial of a preliminary injunction). Pursuant to Rule 65, the trial judge's discretion is guided by four factors, which the moving party must ordinarily establish. Those factors are: (1) a strong or substantial likelihood or probability of success on the merits; (2) a showing of irreparable injury; (3) no substantial harm to others by issuing an injunction; and (4) that the public interest is served by issuing an injunction. Id. See also 11 Wright and Miller, Federal Practice and Procedure, 430-31, 507-510 (1973).

This Court has recently held that when a governmental entity is seeking to enjoin violations of a statute that a substantial showing that the nonmoving party is violating that statute supplants the Rule 65 requirement that the movant show a likelihood of irreparable harm. Tennessee Real Estate Commission v. Thomas Howard Hamilton, et al., No. 96-3330-III, Chancery Court of Tennessee, 20th Judicial District, Davidson County, Part III (December 1996) (Unreported) (copy attached).

The authorization to the Division of Consumer Affairs in Tenn. Code Ann.

§ 47-18-108(a)(1) to request that the Attorney General seek injunctive and other equitable relief constitutes the legislative determination that there is an irreparable injury in any violation of the Act and that the balance of harm preponderates in favor of the State. See 11 Wright & Miller, Federal Practice and Procedure, 461-62 (1973). Accord, Hunt v. United States Securities & Exchange Commission, 520 F. Supp. 580, 608-09 (N.D. Tex. 1981); Demayo v. State of Indiana, 394 N.E.2d 258, 260-61 (Ind. Ct. App. 1979). In regulatory enactments such as the Consumer Protection Act, there is a presumption that the public interest has been considered by the legislature. When this determination has been made by statute, no further showing of irreparable injury or imbalance of hardships is necessary. United States v. Senne X. Eleemosynary Corp., 479 F. Supp. 970, 980-81 (S.D. Fla. 1979). See generally Developments in the Law -Injunctions, 78 Harv. L. Rev. 994, 1059 (1965). Federal courts have consistently applied these principles in government injunction suits, where the "standards of public interest, not the requirements of private litigation, measure the proper need for injunctive relief" to effectuate the stated congressional purpose of a statute. Hecht Co. V. Bowles, 321 U.S. 321, 331, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944) (quoted In FTC v. Virginia Homes Mfg. Corp., 509 F. Supp. 51, 59 (D. Md. 1981)); FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020 (7th Cir. 1988); Commodity Futures Trading Commission v. Mueller, 570 F.2d 1296, 1300 (5th Cir. 1978); Commodity Futures Trading Commission v. British American Options corp., 560 F.2d 135, 141 (2nd Cir.), cert. denied 438 U.S. 905 (1977); Henderson v. Burd, 133 F.2d 515, 517 (2nd Cir. 1943); Commodity Futures Trading Commission v. J.S. Love and Associates Options Limited, 422 F. Supp. 652, 661 (S.D.N.Y. 1976).

Moreover, state courts that have addressed the statutory injunction issue have concluded that when such authority exists, one need not make a separate showing of irreparable harm or inadequacy of other remedies. See, e.g., People ex rel. Hartigan v. Stianos, 475 N.E.2d 1024, 1027-28 (Ill. App. 1985); State v. Fonk's Mobile Home Park & Sales, 343 N.W.2d 820 (Wis. App. 1983); Reed v. Allison and Perrone, 376 So.2d 1067, 1069 (La. App. 1979); State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W.2d 362, 370-71 (Mo. App. 1973).

A statutory injunction is appropriate in this case given that Defendants' actions constitute violations of the Tennessee Consumer Protection Act and the Tennessee Credit Service Businesses Act, and are injurious to the public interest, and to the interests of consumers and legitimate businesses of this state. The injunctive relief sought by the State requires only that Defendants comply with Tennessee law, and provide the services they have obligated

themselves to provide to consumers before the Defendants accept any payment from consumers. The State respectfully submits that the statutory injunction standard applies, but that it can meet either standard for interim injunctive relief.

B. Defendants' Scheme Clearly Violates The Tennessee Credit Services Businesses Act

The Tennessee Credit Services Businesses Act, Tenn. Code Ann. §§ 47-18-1001 -47-18-1011, prohibit, among other things, any credit service business from "charg[ing] or receiv[ing] any money ... prior to full and complete performance of the service that the credit services business has agreed to perform for or on behalf of the consumer". Tenn. Code Ann. § 47-18-1003 (1). Additionally, credit service businesses are prohibited from charging consumers for services that consumers could perform for themselves. A credit service business is any company that represents that it will improve a consumer's credit record, obtain credit from a third party for a consumer, or assist a consumer in either of these two endeavors. Tenn. Code Ann. § 47-18-1002 (5)(A). Also, any violation of this act constitutes a violation of the Tennessee Consumer Protection Act and, consequently, the Tennessee Consumer Protection Act's statutory injunction provision applies with equal force to violations of the Tennessee Credit Service Businesses Act. See Tenn. Code Ann. § 47-18-1010.

It is clear, in the instant case, that the Defendants have represented that it will improve the credit records of its members and obtain credit for its members from third parties. Further, it is clear that the Defendants are charging for those services before those services have been fully and completely performed. See Affidavits of Roger Galloway, paragraph 9; Brian Hughes, paragraph 6; and James Werner, paragraph 23.

C. Defendants' Practices Violate The Tennessee Consumer Protection Act

Defendant's conduct clearly constitutes "unfair and deceptive acts or practices affecting the conduct of any trade or commerce" in Tennessee in violation of Tenn. Code Ann. § 47-18-104(a). Defendant's entire promotional scheme, beginning with the advertisement and continuing through the telemarketing and sales pitches, are patently deceptive, misleading and violative of the provisions of Tenn. Code Ann.

§ 47-18-104(b)(27).

D. The Court Should Intervene to Protect Consumers

Defendants' scheme, at minimum, involves fraudulent and misleading promotional practices and the collection of prohibited payments from consumers. This conduct damages consumers who are particularly vulnerable because they have in the past encountered difficulties with their finances and credit ratings. Defendants are still engaging in this unlawful conduct even though the State served them with the complaint in this action on January 29, 1997.

The State of Tennessee respectfully submits, therefore, that this Court should intervene and temporarily enjoin the Defendants from committing any further violations of the Tennessee Consumer Protection Act and the Tennessee Credit Services Businesses Act. See Tennessee Real Estate Commission v. Thomas Howard Hamilton, et al., No. 96-3330-III, supra.

IV. Conclusion

Sound public policy dictates that this Court should intervene to prevent the Defendants' clear violations of Tennessee law and the consequent harm to consumers. The State respectfully submits, therefore, that this Court should enter a temporary injunction as soon as possible.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Memorandum in Support of Plaintiff's Motion for Temporary Injunction has been personally served on Joseph L. Lackey, Jr. Esquire, 315 Deaderick Street, Suite 105, Nashville, Tennessee 37238 on this day of February, 1997.